IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12/08/2002

CORAM

THE HONOURABLE MR.JUSTICE V.S.SIRPURKAR
and
THE HONOURABLE MR.JUSTICE N.V.BALASUBRAMANIAN

T.C.NO.59 of 1990 and T.C.NO.60 of 1990
and T.C.NOS. 61 to 67 of 1990
and
TCMP.Nos.57 to 65 of 1999

The Commissioner of Wealth-tax,
Coimbatore. ..... Applicant.

-Vs-

N.R.Srinivasan,
Coimbatore. ..... Respondent.

Reference arising out of the order of the Income-tax Appellate Tribunal, Madras Bench-D, in W.T.A.Nos.307 to 315 (Mds)/1982, dated 26.2.1983.

!For applicant :: Mr.T.C.A.Ramanujam, Sr.St.scounsel for IT.

^For respondent :: Mr.Vedantham Srinivasan for
Mr.Bijaikumar.

:ORDER

N.V.BALASUBRAMANIAN,J.
In pursuance of the directions of this Court in T.C.P.Nos.291 to 30 4 of 1984, dated 11.2.1985, the Income-tax Appellate Tribunal has stated a case and referred the following questions of law at the instance of the Revenue for our consideration:-
1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in law in holding and had valid materials to hold that the assessment made under the Wealth-tax Act on the Hindu Undivided Family consisting of three brothers was untenable and should be annulled?
2. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in law and had reasonable materials to come to the conclusion that there was a division of the two properties situate in Coimbatore and Ooty in definite portion for purposes of Wealth-tax?
3. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is justified in law in holding and had valid materials to hold that the property in Desabandhu Street, Coimbatore was only the individual property of three brothers held as tenants in common and was not

held as the property of the joint family of three brothers?
4. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal's conclusion that the value of the two houses in Coimbatore and Ooty could be estimated only by the capitalisation of the rent method is a reasonable view and valid on the facts?

2. The assessment years with which we are concerned are 1968-69 to 1975-76. The subject matter of the tax cases relates to the validity of assessment made on the Hindu Undivided Family under the provisions of the wealth-tax Act, 1957, hereinafter referred to as 'the Act'. There was a Hindu Undivided Family constituted with its Kartha, one N.S.Ramaswamy Iyengar and his three sons, namely, N.R.Srinivasan, N.R.Vijayaraghavan and N.R.Santhanam. The Kartha of the joint family, N.S.Ramaswamy Iyengar died intestate in the year 1932 and thereafter the joint family continued with the three brothers. The joint family possessed two properties; one at Coimbatore and another at Ooty. The property at Coimbatore was situate at West Club Road, Coimbatore and it was a very old building measuring 1500 sq.ft. with appurtenant land. The property at Ooty was a vacant land of an extent of 2.90 acres, called Leslie Cottage. The property at Coimbatore was let out to a tenant and the tenant was in occupation of the property paying monthly rent of a sum of Rs.350/-. As far as the property at Ooty is concerned, it was also in occupation of a tenant. The three brothers found it difficult to maintain the joint family properties due to their avocation and placement in different places in the country and they exchanged letters dated 9.9.1943 among themselves declaring that they divided in status with effect from that date and the joint family consisted of three brothers also stood dissolved. The letters of the brothers were attested by the Chief Presidency Magistrate, Madras, Rao Bahadur L.R.Venkataraman and the Chief Inspector of Factories, Government of Madras, Rao Sahib G.C.Reddy. The partition was effected by allocating shares in the income from the properties and the brothers were enjoying the properties in the said manner.
3. We have seen that the property at Coimbatore was let out to a tenant and in the year 1956, the brothers took over the possession of the property and soon after it was requisitioned by the Government of Tamil Nadu for housing its Regional Transport office for a monthly rent of Rs.300/-. It was only in 1971, the three brothers got possession of the property at Coimbatore. As far as the property at Ooty is concerned, the tenant claimed hostile title to the property and there was some litigation which was ultimately settled in O.S.No.152 of 1975 on the file of the Sub Court, Nilgiris and a portion of the land was allotted to the tenant and the three brothers took the rest of the property and the out-house in the Ooty property was washed away in rain. The eldest brother, the respondent herein wrote a letter to his other brothers on 3.8.1970 suggesting that outright partition was not possible and it was profitable to sell the properties and divide the proceeds. So, the brothers negotiated for the sale of the properties and the advocate of the purchaser insisted that all the three brothers should join in the execution of deed of conveyance and hence, an agreement was also entered into among the brothers on 9.7.1972 stating that they effected partition in 1943 itself and from that date, they were co-owners of the properties and due to the difficulty in effecting division, the properties had not been partitioned by metes and bounds and in order to assure their earnestness to

the purchaser, they decided to execute the deed of sale jointly and the sale proceeds would be divided by metes and bounds proportionately. The agreement also nominated the respondent herein to arrange for the sale of the property. The three brothers made necessary application to the Commissioner of Municipality, Coimbatore, requesting that they may be recorded as co-owners of the properties. The respondent also applied for tax clearance certificate under section 230-A of the Act not only for himself but also on behalf of his two brothers. It was stated in the accompanying application for tax clearance certificate that the Hindu Undivided Family was not assessed to income-tax or wealth-tax. Though a provisional no objection certificate was issued, the Wealth-tax Officer issued a notice on 10.12.1976 to the Joint Family consisting of the three brothers. Meanwhile, for the assessment year 1972-73, the three brothers filed separate returns each as Kartha of his own Hindu Undivided Family, but the Wealth-tax Officer rejected the returns. The Wealth-tax Officer found that the bigger Hindu Undivided Family consisting of the three brothers did not file any return in response to the notice under section 17 of the Wealth-tax Act for the assessment year 1969-70. He therefore made an assessment on the Hindu Undivided Family showing N.R.Srinivasan as Kartha including the value of the properties at Coimbatore and Ooty. He also included the property at Desabandhu Street, Coimbatore as one of the joint family properties on the ground that the property belonged to the Hindu Undivided Family. He made similar assessments for the assessment years 1970-71, 1971-72, 1972-73, 1973-74, 1974-75 and 1975-76. Though in later assessment years he included the amounts received on the sale of the property at West Club Road, Coimbatore which was sold by plots during different assessment years, the Wealth-tax Officer was of the view that the Hindu Undivided Family continued and therefore it should be assessed in the status of Hindu Undivided Family. On appeal, the Appellate Assistant Commissioner held that the assessments made by the Wealth-tax Officer were not sustainable and the properties did not belong to the Hindu joint family. He therefore directed that the assessments should be made only on N.R.Srinivasan, Kartha of smaller Hindu Undivided Family consisting of his wife and children and gave necessary directions for assessment on the other smaller Hindu Undivided Family.

4. Revenue preferred appeals before the Income-tax Appellate Tribunal against the orders of the Appellate Assistant Commissioner and the assessee also filed cross-appeals. The Appellate Tribunal took the view that partition took place in the year 1943 and since the Hindu Undivided Family ceased to exist from 1943, notice under section 17 of the Act was not a valid notice and assessment could not be made on the Hindu Undivided Family. The Appellate Tribunal also held that the property situate at Desabhandu Street, Coimbatore could not be a joint family property. The Appellate Tribunal also held that the valuation of the properties should be done only by adopting rental capitalisation method. In this view of the matter, the Appellate Tribunal dismissed the appeals preferred by the Revenue and allowed the cross appeals preferred by the assessee. The Revenue, aggrieved by the orders of the Appellate Tribunal, sought for a reference and the Appellate Tribunal has stated a case and referred the questions of law referred to earlier.

5. Mr.T.C.A.Ramanujam, learned senior standing counsel appearing for the department submitted that the view of the Appellate Tribunal is erroneous in the point of law as in 1943, partition had not taken place by

metes and bounds and there was a division only in status. Learned counsel submitted that the mere division in status is not sufficient for the purpose of Wealth-tax Act and there must be a division by metes and bounds. He also submitted that there was no order by the Wealth-tax Officer recognising the partition. Learned counsel relied upon the decision of the Supreme Court in TATAVARTHI RAJAH v. C.W.T. (225 ITR 561) and submitted that unless the properties are divided by metes and bounds, the joint family would continue for the purpose of assessment under the Wealth-tax Act. He also submitted that the view of the Appellate Tribunal that the property at Desabhandu Street, Coimbatore is not a joint family property is not correct as the property was in fact derived from the father of the assessee. Learned counsel, in his fairness, has not disputed the finding of the Tribunal on the adoption of the rental capitalisation method to value the properties.

6. Mr.Vedantham Srinivasan, learned counsel appearing for the assessee, on the other hand, submitted that the properties were divided by metes and bounds in the year 1943 itself and hence, the provisions of section 20 of the Act do not apply. Learned counsel submitted that the Revenue has not questioned the genuineness of the letters of 19 43 and in the year 1943 only method of division of the properties was to divide the income from the properties and by division of income, the joint family had ceased to exist and hence, it is impermissible for the Wealth-tax Officer to issue notice under section 17 of the Act to the joint family. Learned counsel submitted that the property at Desabhandu Street, Coimbatore cannot, in any event, be regarded as a joint family property and the Appellate Tribunal has gone into the tax effect under the Wealth-tax Act for each of the assessment years in question and after granting the exemption u nder section 5 of the Act, it found that there was no tax effect and the questions referred have become academic and hence, the reference may be returned without answering the questions.

7. We heard Mr.T.C.A.Ramanujam, learned Standing counsel for the Revenue and Mr.Vedantham Srinivasan, learned counsel for the assessee. It is not in dispute that the house property in the West Club Road, Coimbatore was in occupation of a statutory tenant and after the statutory tenant had vacated the property in the year 1956, it was requisitioned by the Government of Tamil Nadu for housing its Regional Transport Office and the three brothers were enjoying the property by dividing the rental income from the statutory tenant as well as from the Government of Tamil Nadu. The Revenue has also not questioned the genuineness of the letters dated 9.9.1943 which were written by the brothers among themselves, attested by two trustworthy persons stating that the joint family consisting of the three brothers stood dissolved from 9.9.1943 and all the brothers expressed their intention to be separated in status and the joint family ceased to exist from 9.9 .1943. As far as other property in Leslie Cottage, Ooty is concerned, that property was also in occupation of a hostile tenant and the tenant claimed absolute right to the property and only in 1977, the matter was compromised in a suit instituted by the tenant. It is therefore clear that the properties were not in the physical possession of the three brothers, but they were in the physical possession and occupation by the tenants and the mode of enjoyment of the properties by the three brothers was the enjoyment of the income derived from the properties. In other words, it was not possible for the assessees in 1943 to enter into the properties and physically divide the properties and allot a definite and specific share to the three brothers in view of the occupation of

the properties by the statutory tenant in one case and the hostile tenant in another case. The three brothers have divided the properties in a manner permissible or possible under the law as right to property is a bundle of rights and where it is not possible to effect a physical division, the allotment of separate shares in the properties to the assessees and the division of income arising from the properties would be sufficient to partition the properties by metes and bounds. We are of the view that law does not require a person to do an impossible thing and when the tenants were in lawful possession of the properties, it would not have become possible for the brothers to enter the properties and physically divide the same, particularly when there was a hostile tenant in one case and allot separate portion to each one of them. In our view, in the present case the division of joint family properties has taken place by dividing the income that accrued from the properties and allotting the share in the income from the properties to each brother and that would amount to partition of the properties by metes and bounds.

8. In CHARANDAS HARIDAS v. COMMR. OF INC. TAX (XXXIX ITR 202) a Hindu joint family represented by its kartha was a partner in a firm and the family was divided. The Supreme Court held that the partition by division of share income from the firm would amount to partition of the property. In our view, what has to be seen is whether the partition was effective. As held by the Supreme Court, for an asset of the kind where there is no other mode of partition open to the parties, the law does not contemplate that a person should do the impossible. It is not the case of the Revenue that the documents, viz., letters among the brothers, are pretence and not genuine ones. The intention of the brothers, as evident from the letters dated 9.9.1943 was to effect a partition of the joint family properties and to enjoy the income from the properties separately from the date of the letter and that would be sufficient to hold that there was a partition by metes and bounds. After the partition, the three assessees would be holding the properties in different character and in different rights and the brothers would be holding the property as tenants in common. The effect of the partition is that the unity of title in the property is lost, though there might have been jointness in possession, in the sense that the three assessees were holding the properties without physical division, and we are of the view, they would be holding the properties as tenants in common.

9. Mr.T.C.A.Ramanujam, learned standing counsel for the Revenue strongly relied upon the decision of the Supreme Court in TATAVARTHI RAJAH v. C.W.T. (225 ITR 561) wherein the Supreme Court considered the effect of section 20 of the Wealth-tax Act and held that section 20 would apply to the transaction entered into prior to the enactment of the Wealth-tax Act. There can be no dispute about the proposition of law, but the facts of the case before the Supreme Court are different and hence, the proposition is inapplicable. In the case before the Supreme Court, the assessee was a Hindu Undivided family consisting of father and three sons and there were deaths in the family, viz., the death of Kartha and the death of an eldest male member leaving behind them two widows of the deceased coparceners and two sons. One of the widows filed a suit for partition in the year 1954 and ultimately a preliminary decree was passed in the year 1956 and a final decree was passed in the year 1961 on the basis of compromise. The question arose in the assessment years 1958-59, 1959-60 and 1960-61 regarding the continuance of the

joint family, though a suit for partition was instituted in the year 1954 and the written statement was filed by the remaining two sons in October, 1954 agreeing for the division of the properties. The Supreme Court held that in the absence of division of properties by metes and bounds and in the absence of any order recognising partition under section 20 of the Wealth-tax Act, the family should be deemed to continue and would be assessable as a Hindu Undivided family. The judgment in Tatavarthi Rajah's case is distinguishable as in the case before the Supreme Court there was no division of properties by metes and bounds when the Wealth-tax Act came into force on 1.4.1957 and the final decree was passed in the year 196 1 and the Supreme Court therefore held that the mere division in status would not be sufficient and the joint family would continue to be assessed as a Hindu Undivided family till the partition in the family takes place by metes and bounds and the Wealth-tax Officer recognises the partition. There is no dispute that there must be a division by metes and bounds and the property must be divided and allotted to individual members and a mere division in status is not sufficient for the purpose of Wealth-tax Act as each members of the family must be allotted a specific share in the property. However, the facts of the case are different in the sense that in the year 1943 itself partition had taken place and at that time, the only mode of division of the properties was to divide the income from the properties and enjoy the same and that would in effect mean a division of the properties. In our view, the law does not contemplate that the members of the family should wait till the tenants vacate the property or until the disputes between them and the tenants are settled and then effect a physical partition to be recognised by the Wealth-tax Officer. The division in the present case, took place in the year 1943 prior to the Wealth-tax Act came into force and hence, it is not necessary that there must be an order under section 20 of the Wealth-tax Act as the properties were divided in the year 1943 itself. Hence, the decision of the Supreme Court in Tatavarthi Rajah's case (225 ITR 561) has no application to the facts of the case.

10. No doubt, it is true that in KALLOOMAL TAPESWARI PRASAD (HUF) v. C.I.T. (133 ITR 690) and in I.T.O. v. N.K.SARADA THAMPATTY (187 ITR 696) the Supreme Court held that the definition of the term, ' partition' in section 171 of the Income-tax Act does not recognise the partition of a Hindu Undivided Family even if it is effected by a decree of Court, unless there is a physical division of the property of the family and if the property is not capable of being physically divided, then, unless there is a division of the property to the extent it is possible, otherwise, the severance of status would not amount to partition. The Supreme Court also held that under the Hindu Law, members of a joint family may agree to partition of joint family property by private settlement, agreement, arbitration or through a Court decree and the members of the family may also agree to share the income from the property according to their respective shares and in all such eventualities the joint status may be disrupted, but such disruption of family status is not recognised by the legislature for the purpose of income-tax. The Supreme Court in C.I.T. v. VENUGOPAL INANI (239 ITR 514) held that although the mere severance of status in the family would tantamount to partition under the Hindu law of joint family, but the requirement of the Income-tax Act is a little more and a partition to be recognised under the Income-tax Act must lead to a physical division of the joint properties. The Supreme Court also held that if the properties belonging to a Hindu Undivided

Family are not partitioned by dividing them among the members, even though capable of division, then the members of the family cannot say that so far as those properties are concerned, they stand divided. Those decisions were rendered with reference to the provisions of the Incometax Act and it is no doubt true that the decisions of the Supreme Court would equally apply to the provisions of the Wealth-tax Act as well, especially when section 20 of the Wealth-tax Act is strictly worded and the decision of the Supreme Court in TATAVARTHI RAJAH v. C.W.T. (225 ITR 561) is a case under the Wealth-tax Act reiterating the position under the Wealth-tax Act.

11. As far as the facts of the case are concerned, we have to see the position as it existed in the year 1943 when the partition took place. There were two properties belonging to the joint family, one at Coimbatore and another at Ooty and so far as the property at Coimbatore is concerned, it was not capable of physical division as tenant was in occupation of the property and the property at Ooty was also in occupation of a hostile tenant, and therefore physical division of the properties was impossible. In such circumstances, the division of the properties to the extent possible would be to divide the income from the joint family properties and to declare the share of the divided members in the joint family properties and further to declare that the properties of the joint family have been partitioned and the joint family ceased to exist, which had been done on the facts of the case. It is not a case where the members agreed to share income from the property, though the property was capable of physical division. It is also not a case where the members agreed to divide the income keeping the corpus intact. On the other hand, the clear and manifest intention of the members was to divide the properties and to disrupt the joint family by partition as evident from the letters exchanged between themselves in 1943 and since the properties were not capable of physical division, the three brothers have divided the properties by the method possible, viz., to divide the income and to disrupt the joint family. The decisions of the Privy Council in MALIK HARKISHAN SINGH v. MALIK PARTAP SINGH (42 C.W.N. 1021) and MUSAMMAT INDER KUER v. MUSAMMAT PIRTHIPAL KUER AND ANOTHER (49 C.W.N. 689) are authorities for the proposition that separation of the family can be proved by the conduct of the members in the attendant circumstances. The Privy Council also held that once shares are defined, there is severance of joint status and the parties may then make a physical division of the property or they may decide to live together and enjoy the property in common, but the property ceases to be joint immediately the shares are defined and their subsequent living together and joint enjoyment can be regarded as tenants in common. Though under the Wealth-tax Act, the mere severance of status is not sufficient and there must be a division by metes and bounds, on the facts of the case, we find that in 1943, the only method of dividing the properties by metes and bounds would be to divide the income from the properties which has been done and we hold that it would amount to partition by metes and bounds.

12. We hold that the decision of this Court in C.W.T. v. K. RAMAKRISHNAN (139 ITR 965) is nearer to the facts of the case. In that case, the partition in a Hindu Undivided family took place prior to the commencement of the Wealth-tax Act, and this Court held that when there is no family, any assessment made on such a family cannot bring into existence one and a Hindu Undivided family cannot be brought into existence by making assessment. This Court further held that the status is acquired by birth under the relevant

personal law and the constitution of the family is governed by the provisions of the personal law and not by what the Income-tax Officer does in any particular case.

13. We hold that the partition of the Hindu Undivided family by metes and bounds has taken place in the year 1943 itself. We therefore hold that the Tribunal was correct in its view that the Wealth-tax Officer was not correct in holding that the joint family continued even after the partition in the year 1943 as the joint family ceased to exist from 1943 and the Wealth-tax Officer could not have issued the notice under section 17 of the Act on a non-existent joint family. Accordingly, we answer the first question against the Revenue and in favour of the assessee. Consequently, we answer the second question of law also in favour of the assessee and against the Revenue.

14. As far as the third question is concerned, though our answer to the first two questions is sufficient to answer the said question also in favour of the assessee, we find, on the facts of the case, the third question, in any event, has to be answered in favour of the assessee. The property in Desabandhu Street, Coimbatore which is covered in the third question originally belonged to one Kamalammal, the sister of the assessees and she died in the year 1943 leaving behind a Will dated 20.9.1931. According to the Will, the house property in Desabandhu Street, Coimbatore was bequeathed by her in favour of father to be enjoyed by him till his life time and after his death, the property has to go absolutely to the male heirs of her father. Since her father died in the year 1932 prior to the date of death of Kamalammal, the will of Kamalammal had not taken effect on the date of his death. After the demise of Kamalammal, the property devolved on the three brothers in terms of the Will. The Appellate Tribunal which had an opportunity to look into the terms of the Will has found that the bequest in favour of the three brothers was absolute and the three brothers obtained 1/3rd share in the property individually and absolutely. It is not possible to hold that the property originally vested in the father and then from the father, it devolved on the three brothers. We hold that the three brothers derived the property directly from their sister and not from their father. Therefore, we hold that the property in Desabandhu Street, Coimbatore was not rightly held to be a joint family property as the property was not obtained from any ancestral source and it was obtained by way of bequest from their sister. It is also not the case of the Revenue that after the property was obtained by them, the three brothers treated the property as joint family property. We therefore hold that the Appellate Tribunal was also correct in holding that the property at Desabandhu Street, Coimbatore was not the joint family property. Accordingly, the third question is answered in favour of the assessee and against the Revenue.

15. As far as the fourth question is concerned, learned standing counsel for the Revenue, in his fairness, has not seriously disputed the application of the rental capitalisation method to value the properties in occupation of the tenants. As far as the properties in occupation of the tenants are concerned, we hold that the rental capitalisation method would be the proper and appropriate method of valuation to value the tenanted properties. Accordingly, we answer the fourth question in favour of the assessee and against the Revenue.

16. We also find that the Appellate Tribunal has given an

additional reason in dismissing the appeals preferred by the Revenue. The Appellate Tribunal has found that after the application of the rental capitalisation method to arrive at the market value of the properties and after granting necessary deductions under section 5(1) of the Wealth-tax Act, there would be no tax effect for all the years in question except for two years and in respect of those two years, the tax effect would only be marginal even assuming that the assessments made on the bigger Hindu Undivided Family are correct. We are therefore of the view that it will not be unreasonable to hold that the questions referred have become academic considering the nil tax effect under the Wealth-tax Act for most of the assessment years in question and marginal tax effect for two years and to return the references. However, since we have found that the order of the Appellate Tribunal is sustainable on merits of the case, it is not necessary to return the reference on the ground that the questions have been academic in nature.

17. Accordingly, we answer the questions as under:-

Questions 1 to 4:- In the affirmative, against the Revenue and in favour of the assessee.

No costs. All T.C.M.Ps. are ordered.

Index: Yes
Website: Yes
(V.S.S.,J.) (N.V.B.,J.)
na.

12-8-2002

To

1.The Asst. Registrar,
Income-tax Appellate Tribunal,
Rajaji Bhavan, III Floor,
Besant Nagar, Chennai (5 copies).
2.The Secretary, Central Board of Revenue,
New Delhi (3 copies).
3.The Asst. Commissioner of Income-tax, Coimbatore Region, Coimbatore.
4.The Commissioner of Wealth-tax, Coimbatore.
5.The Wealth-tax Officer, City Circle I(3), Coimbatore.